



FreshProduce

ASSOCIATION OF THE AMERICAS

Via Email Transmission: Dexter.Thomas@usda.gov

EDI Comments

AMS, F&V, PACA Branch

1400 Independence Avenue, SW

Room 2095-S

Washington, D.C. 20250-0242

March 15, 2006

Re: Regulations Under the Perishable Agricultural Commodities Act
(PACA)

Docket No. FV05-373

Dear Mr. Thomas:

The Fresh Produce Association of the Americas (FPAA) is a trade association representing over 100 U.S. corporations that are principally distributors, importers, and marketers of fresh fruits and vegetables grown mainly in the Republic of Mexico. The FPAA's members include operations in Arizona and California. These members are a large part of the fresh fruit and vegetable industry which sells over 4 billion dollars of fresh fruits and vegetables which originate in Mexico and are sold in the United States.

On behalf of the FPAA's members I am submitting comments on the Advance Notice of Proposed Rulemaking published in the January 30, 2006 Federal Register.

First and foremost, it is critical that the AMS become involved in propounding new regulatory language that ensures a secure, predictable and consistent manner by which sellers of fresh fruits and vegetables may preserve their PACA Trust rights when Electronic Data Interchange (EDI) is used.

The FPAA's distributor/grower agent members are charged with preserving their respective grower's rights under the trust provisions of PACA. (See, 7 C.F.R. §46.46 (c)(2) and (3)). It is critically important to these businessmen that a clear-cut, low-cost method of preserving PACA Trust rights in EDI transactions exists. Otherwise, these businesses run the risk of having their good-faith actions in attempting to preserve PACA

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Trust rights second-guessed by a judge. As you know, the ability to preserve PACA Trust rights in, for example, a bankruptcy often means the difference between whether a seller will be paid monies rightfully owed for its product.

Assuming that a seller has included the PACA Trust notice specified by 7 U.S.C. §499e(c)(4), EDI has made the preservation of PACA Trust rights unclear in the following situations: 1) the buyer either willingly or through oversight does not receive the entire EDI invoice transmission; 2) the buyer does not download the PACA Trust notice; 3) the buyer does not opt to receive the information; 4) the buyer does not buy the data field from the EDI service provider that allows the inclusion of the trust language; or 5) the EDI service provider does not translate the field that contains the trust language. In each instance, although seller has done what it can to preserve its PACA Trust benefits, the buyer can dispute the question of whether the buyer received the notice. As you have also correctly noted, buyers are also informing sellers that they will not accept paper notices of intent to preserve trust benefits or will charge back their sellers for the cost of downloading PACA Trust Notices through EDI or for the cost associated with receiving a paper notice. Since the original intent of the PACA Trust is to protect sellers of perishable agricultural commodities from non-paying buyers, the FPAA submits that no additional financial barriers should be placed upon sellers either through regulation or from buyers in order to preserve those rights.

In view of the above factors, the FPAA supports the simple low-cost solution of amending the existing regulations to include EDI transactions. FPAA sees no technological barriers and no increased costs to buyers or sellers since the technology is already in place. FPAA supports the type proposed amendment forwarded by the Western Growers Association dated March 3, 2006 with the further clarification that the seller's PACA Trust rights would also be preserved in those instances in which the buyer does not buy or include a data field from the EDI service provider that allows the inclusion of the trust language. A proposed text follows:

["(3) Licensees may choose an alternative method of preserving trust benefits from the requirements described in paragraphs (f)(1) and (2) of this section. Licensees may use their invoice or other billing statement to preserve trust benefits. The alternative method requires that the licensee's invoice or other billing statement, whether documentary or electronic, contain the following statement at the time of mailing or transmission to the debtor, irrespective of whether or not the debtor provides a field for including such statement or downloads, receives or accepts such statement.

(i) The statement: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499(e)(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."; and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.]

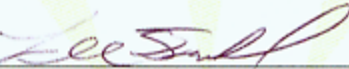
(Sec. 1, 46 Stat. 531, as amended; 7 U.S.C. 499a et seq.)

FPAA urges AMS to promulgate this or other similar language in order to reflect growing industry practices and to provide a certain method by which PACA licensees may preserve their PACA Trust benefits when transmitting by EDI. The PACA Trust has a proven and effective history which will be ensured by amending the regulations to keep up with industry practices.

Sincerely,

FRESH PRODUCE ASSOCIATION OF THE AMERICAS

By:



Lee Frankel, President